IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.662 OF 1995
IN
ARBITRATION PETITION NO.184 OF 1992

1. Municipal Corporation of Greater Bombay, Mahapalika Building, Mahapalika Marg, Mumbai.

2. Municipal Commissioner, MCGB, Mumbai. Appellants

versus

1. Atlanta Infrastructure Ltd. Atlanta B-22/A, V.M.Road, Ville Parle (W), Mumbai 400 049.

2. M.C.Bhide, 8, Halima Building, 2nd Floor, 7, Nanabhai Lane, Mumbai 400 001. Respondents

Mr.R.D.Dhanuka with Mr.Prakash Mahadik for appellants.

Mr.M.M.Vashi with Mr.Manish Mistry i/by M/s.M.P.Vashi & Co. for respondents.

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CORAM : DR.S.RADHAKRISHNAN AND
S.C.DHARMADHIKARI, JJ.

DATE OF RESERVING THE JUDGEMENT : 04/10/2005

DATE OF PRONOUNCING THE JUDGEMENT : 16/12/2005

JUDGEMENT (PER : S.C.DHARMADHIKARI, J.) :-

1. This appeal is directed against the judgement and order of a learned Single Judge dated 18th

January 1996 in Arbitration Petition No.184 of 1992. The Arbitration Petition invoked Section 30 of the Arbitration Act, 1940 to challenge an award dated 6th August 1992 made by the second respondent, who was appointed as Sole Arbitrator in disputes and differences arising out of a contract awarded by the Appellants in favour of first respondent herein.

2. By the order under appeal, the learned single Judge dismissed the petition filed by the Appellant to challenge the aforesaid award. Aggrieved by refusal to interfere in the award by the learned Single Judge, the Appellate Jurisdiction of this Court under Arbitration Act as well as Clause 15 of Letters Patent has been invoked by the Appellant Municipal Corporation of Greater Bombay.

3. The facts about which there is no dispute, may be now set out. First Respondent is a registered Contractor with the Appellant herein. The appellant proposed to carry out reconstruction of Barrister Nath Pai Marg in Cement Concrete. The work was divided into three sections i.e. Part-I, Part-II and Part-III. First respondent submitted it’s tender pursuant

to the offer of the appellant vide their letter dated 5th December 1985. After negotiations between the appellant and first respondent, a formal contract was duly executed for the aforesaid work. The contract was also approved by the Standing Committee vide Resolution No.1242, dated 11th February 1986. The work was valued at Rs.1,37,49,417/-. According to the terms and conditions of the contract, the work was to be completed within 12 months excluding Monsoon i.e. on or about 2nd June 1987. the work was commenced on 23rd February 1986. During execution, scope of the work was increased and a communication to this effect was addressed by the appellant to the first respondent. It appears that this step was taken pursuant to Standing Committee Resolution No. 815, dated 19th August 1987. As the scope of the work was increased, the appellant called upon the first respondent to furnish additional deposit of Rs.1,35,500/- either in cash or in the form of Bank Guarantee. First respondent has also furnished revised bills of quantities. In pursuance of the Standing Committee Resolution, original contract period of 12 months was revised and the date of completion was stipulated as 12th January 1989. The break up of the revised cost of the contract was

Rs.2,24,67,307/-.

4. During the course of execution of the work, according to the first respondent, the appellant deducted huge sums from their running account bills. It appears that there was some discussion with the authorities but the appellant took a stand that recoveries should be made from the further bills. This was pursuant to a decision reached to the effect that payment already made is not commensurate with the nature of work.

5. First respondent disputed the aforesaid stand and vide their letter dated 26th May 1988 contended that all items listed in the Corporation's letter dated 20th May 1988 are executed as per Engineer's instructions and as per bill of quantities, which form part of the agreement. It was contended that payments were made after taking measurements of the work executed. Therefore, stand of the appellant not to make payment of the items, was arbitrary and illegal. It was contended that if recovery, as proposed, is made, it would amount to violation of agreement. The first respondent requested that they may be allowed to proceed with the work according to the terms and conditions of the

agreement. Thereafter, a Legal Notice was addressed by first respondent on 3rd June 1988 because first respondent apprehended that the recoveries to the tune of Rs.10,68,713=10 Ps. would be made.

6. According to first respondent, despite aforesaid correspondence, the appellants persisted with their stand. Intervention of the Municipal Commissioner was sought in the matter by the first respondent. A communication to this effect is dated 13th June 1988. In pursuance of the aforesaid communication, a meeting was convened and representatives of first respondent were invited to the same. It was brought to the notice of the Municipal Commissioner as well as first respondent by the appellant, that recoveries have been made and as far as refund is concerned, the stand would be made clear subsequently. It appears that as far as this aspect is concerned, the appellant directed the first respondent to get in touch with the Director (Engineering, Services and Projects) of the appellant. First Respondent thereafter followed up the matter with him. There is detailed correspondence to this effect.

7. Since the matter could not be resolved at his end, first respondent once again approached the Municipal commissioner. By letter dated 19th February 1990 addressed to the Municipal Commissioner, first respondent brought to his notice alleged breaches of the terms and conditions of the contract committed by the Corporation. It was their case that recoveries have been made from bills wrongfully and illegally. Similarly, subsequent payments were made at lesser rates. It was also their case that construction of Central Divider was wrongfully withdrawn from the scope of the contract. It is their case that on account of the aforesaid they suffered losses. Since the grievances were not redressed, the Municipal Commissioner's intervention was sought and he was informed that said disputes and differences now ought to be resolved by Arbitration. Prior to this communication, it appears, that there was a letter addressed by the Corporation communicating three names which were acceptable as Arbitrators in the matter. Initially, it appears that one S.K.Dharap was to be appointed as Sole Arbitrator. It is in this background that claims came to be forwarded vide the aforesaid letter.

8. It also appears from the record that attempts have been made by the first respondent to get the matters resolved through the intervention of the Municipal Commissioner. It appears that detailed representation was addressed to him. It appears that pursuant to the representation, a hearing was held and the then Municipal Commissioner was to communicate his response. However, the Municipal Commissioner changed and initially it was thought that the new incumbent would be requested to hold a fresh hearing. However, it was brought to the notice of the appellant by the first respondent that a decision was already taken to appoint an Arbitrator and, therefore, the matter should be referred to him. The Corporation took a stand that first respondent had forfeited it’s rights to get the matter resolved through Arbitration, as it sought intervention of the Municipal Commissioner. Therefore, if first respondent is desirous of having the dispute resolved through Arbitration, it would be necessary for it to make a fresh application. Reliance was placed on Clause 97 of the Terms and Conditions of the contract.

9. It is in pursuance of the aforesaid that the matter was eventually referred to the Sole

Arbitration of the second respondent. Accordingly, he entered upon reference.

10. In pursuance of the directions issued to file statement of claims and documents in support, first respondent presented their statement of claims before the learned Arbitrator on 6th February 1992. The record shows that in all six claims were made under separate and distinct heads. Claim no.1 pertains to refund of wrongful and illegal deductions made and/or amounts withheld wrongfully. Claim no.2 arises out of compensation for loss suffered on account of wrongful omission of an item of work. Claim no.3 is for compensation for loss suffered on account of over-heads and profits. Claim no.4 is again of compensation for loss suffered on account of extra expenditure incurred on labour, materials etc.. Claim no.5 is for interest and claim no.6 is for arbitration costs.

11. Upon being served with the statement of claim, a reply was filed by the appellant wherein after dealing with the statement of claim certain counter claims were raised. The claimant’s compilation of documents is termed by the learned Arbitrator as "CD-I" and "CD-II". To the reply

furnished by the appellant, first respondent submitted their rejoinder and relied upon further documents which were taken on record under compilation CD-III. Appellants examined witnesses and made oral submissions through their counsel. The date of making of award was extended up to 30th September 1992. The learned Arbitrator made his award much prior to this date. The award which contains brief reasons, directs that the appellant shall pay to the first respondent a net sum of Rs.66,56,991=20 Ps. rounded up as Rs.66,56,991/- with interest @ 18% p.a. with effect from 7th August 1992 till the date of payment or Decree by the competent Court, whichever is earlier. The aforesaid sum was arrived at in the following manner :-

CLAIM NO.	SUM AWARDED
CLAIM NO.1 :-	
Item No.1	5,15,000-00
Plus	1,84,814-02
Item No.2	43,596-68
Item No.3	3,40,496-52
Item No.4	4,37,897-97
Item No.5	72,873-00
CLAIM NO.2	4,56,000-00
CLAIM NO.3	21,20,000-00
CLAIM NO.4	5,99,500-00

Interest past		13,84,377-00
Pendente lite		4,39,699-00
Future		@ 18% p.a. on the award sum
CLAIM NO.6		1,00,000-00
TOTAL :-	Rs.	66,94,254-19

COUNTER CLAIM NO.	SUM AWARDED
1.	Nil
2.	Nil
3.	Nil
4.	Nil
5.	37,262-90
6.	Nil
7.	Nil
8.	Nil
TOTAL:- Rs.	37,262-90

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12. The aforesaid award signed and published on 6th August 1992, is subject matter of challenge in Arbitration Petition No.184 of 1992.

13. The appellant vide the aforesaid petition presented to this Court on 20th November 1992 applied for quashing and setting aside of this award. In the submission of the appellant, the learned Arbitrator has misconducted himself and the award is otherwise vitiated by errors apparent on the face of it. It was contended that the award which grants the claims of the

first respondent and rejects the counter claim of the appellant in toto, is contrary to the General Conditions of the Contract and Special Conditions thereof. It was contended that save and except item no.5 of claim no.1, every claim was incapable of being entertained and considered by the learned Arbitrator. In other words, the same being opposed to the terms and conditions of the contract, could not have been awarded by the learned Arbitrator. It was contended that the claims made under different heads and sub- items were totally vague inasmuch as they were devoid of any particulars. No material has been produced by the first respondent before the learned Arbitrator to substantiate them. The award is based on surmises and conjectures. It is in the nature of guess work. It was contended that no reasons are assigned by the learned Arbitrator. He was bound to do so after the parties specifically requested him to give reasons. The question is of public monies and therefore, the Arbitrator could not have awarded the sums as claimed by the first respondent. It was contended that the interpretation of the terms and conditions of the contract is perverse and no prudent man can reach the conclusion as has been arrived at by the learned Arbitrator.

It was contended that the Court is not exercising appellate powers but it is not precluded from scrutinising the award and finding out whether it is vitiated by errors apparent on the face of it or by misconduct on the part of learned Arbitrator. Accordingly, the Court was requested to scrutinise the award claim-wise and ultimately hold that the same is null, void and of no legal effect.

14. The Arbitration Petition presented by the appellant was resisted and an affidavit was filed by the first respondent of it’s Director. It was contended therein that the jurisdiction exercised by the Court under section 30 of the Arbitration Act is and cannot be compared with Appellate Jurisdiction. It was contended that the award is not vitiated as alleged. The award is not contrary to the terms and conditions of the contract, as alleged. It was contended that the award contains reasons and cannot be said to be unreasoned at all. On the other hand, on a plain reading thereof, it will be clear that the claim has been proved. It was pointed out that evidence was laid before the Arbitrator and after considering the oral as well as documentary evidence, the award has been made. Considering

the fact that the Arbitrator has gone into each and every claim minutely and has not awarded the sums in full, shows that he has acted independently and in a unbiased manner. The Arbitrator has not allowed wastage of public money and funds but bearing in mind this aspect, has reduced the amounts awarded in favour of first respondent considerably. In the light of these facts, it was prayed in the affidavit in reply filed on 28th June 1993 that the Arbitration Petition be dismissed.

15. This Arbitration Petition was placed before the learned Single Judge and by the impugned judgement and order the learned Judge held that the appellant could not establish that claims made were beyond the terms of contract. In other words, the appellants could not substantiate their pleas insofar as as jurisdiction of Arbitrator. Similarly, learned Judge held that the appellant could not establish that claims were inconsistent with each other and could not have been awarded. Consistent with this conclusion, the learned Judge held that the claims awarded are not in contravention or breach of the contractual stipulations. After holding so, the learned Judge concluded that there is no

merit in the challenge raised by the appellant to the award. He, therefore, dismissed the Arbitration Petition with costs.

16. It is pertinent to note that all parts of the contractual work were executed by first respondent herein. On account of the disputes and differences, they raised claims with regard to each of these parts. All such claims were referred to the Sole Arbitration of the same learned Arbitrator. For all such parts he awarded sums in favour of first respondent herein. The appellants were aggrieved by three awards and therefore, instituted three Arbitration petitions. The first Arbitration Petition is 184/1992 whereas other two Arbitration Petitions are 185/1992 and 186/1992.

17. Since the parties agreed before the learned Single Judge that the issues raised in all three petitions are common, the learned Judge heard all three petitions together and dismissed them by a common judgement.

18. Mr.Dhanuka and Mr.Vashi - learned counsel appearing for appellant and first respondent agree that our judgement and order in the first

appeal would govern the other two appeals as well.

19. Mr.Dhanuka - learned counsel appearing for the appellant contended that the judgement and order of the learned Single Judge is erroneous and deserves to be set aside. He submits that the learned Judge ought to have exercised the powers conferred by Section 30 of the Arbitration Act and quashed and set aside the awards in question. He submits that the learned Single Judge erroneously holds that the awards are not liable to be set aside as they are not vitiated by any apparent errors or by misconduct on the part of learned Arbitrator. Mr.Dhanuka was at pains to point that the learned Single Judge ought to have concluded that the claims were not arbitrable at all. Mr.Dhanuka invites our attention to Clauses 96 and 97 of the General Terms and Conditions of Contract and submits that the mandate of the clause is that every dispute with regard to quantity, quality and description of the items and the nature of work, should be first raised before the Municipal Commissioner. If the Municipal Commissioner either accepts or rejects such claims, then it is not open for the claimant to raise them before the Arbitrator. He

submits that in the present case, admittedly, Arbitration was invoked when the Municipal Commissioner was seized of the matter. In other words, the appellant had invoked Clause 96 of the General Terms and Conditions. Therefore, they could not have raised the claims and matters which were raised before the Municipal Commissioner in Arbitration. It is not as if the Municipal Commissioner has to specifically communicate to the first respondent that the claims have been accepted in full or in part. The fact that the communication is not responded to means that the claims have been rejected. Therefore, such claims cannot become arbitrable and thus subject matter of the arbitration proceedings.

20. Alternatively, Mr.Dhanuka submits that such of the claims which are not raised before the Municipal Commissioner by the claimants, cannot be raised before the Sole Arbitrator in arbitration proceedings. He invites our attention to a synopsis handed in to demonstrate that first respondents have raised claims before the Arbitrator although these sums have not been demanded during prolonged and detailed correspondence with the Municipal Commissioner.

There is a clear prohibition in raising them before the Sole Arbitrator. Once there is a clear prohibition in raising and considering them, then the Sole Arbitrator could not have awarded them. Further, assuming without admitting that such claims could be raised and considered, there is no explanation as to why first respondent enhances the sums before the Sole Arbitrator. Not only is the sum enhanced and claim inflated, but there is no evidence to substantiate the same. In these circumstances, the Arbitrator could not have awarded them. The award is, therefore, contrary to Clause-96 of the General Terms and Conditions and liable to be quashed and set aside on this ground alone. Mr.Dhanuka invites our attention to the statement of claim as also the discussion on this aspect of the matter in the award. He submits that the learned Arbitrator had seriously erred in rejecting the preliminary objection raised on behalf of appellant on the basis of Clause-96 of the General Terms and Conditions. He also invites our attention to the reasoning of the learned Single Judge on this aspect of the matter. He submits that the learned Single Judge has clearly missed the point. The argument could not have been considered by referring to

Clause-97 of the General Terms and Conditions. Further, the learned Single Judge has, without assigning any reasons, proceeded to uphold the finding of the learned Arbitrator on the preliminary objection. He submits that the correspondence could not be relied upon to reject this contention.

21. The order of learned Single Judge, according to Mr.Dhanuka, over looks the mandatory nature of Clause-96 and therefore, the judgement under appeal is liable to be set aside as being travelling beyond the terms of contract. Mr.Dhanuka invites our attention in support of this submission to the letters dated 17th September 1990 and 24th September 1991 which would demonstrate that additional claims have been raised. Mr.Dhanuka also takes us through the statement of claim, reply thereto and the discussion in the impugned award.

22. Mr.Dhanuka then proceeds to challenge the judgement of learned Single Judge with regard to the conclusions reached claim-wise. He submits that insofar as claim no.2 is concerned, the same is contrary to clause 14 of the General Terms and Conditions. He submits that claim for

compensation for losses suffered on account of wrongful omission of an item of work, could not have been considered by the learned Arbitrator. He submits that clause 14 empowers the Engineer to omit part of the work. Once such power is exercised, then any expenditure occasioned by such omissions/deletion, could be claimed only on actual basis. In other words, only the actual expenditure is capable of being reimbursed once part of the work is omitted or deleted. Nothing more can be awarded. There is, therefore, no question of considering any claim of loss of profit and productivity. The Sole Arbitrator as well as the learned Single Judge have ignored the mandate of Clause 14 of the General Terms and Conditions as also clause 94 thereof. He submits that the amount of Rs.4,56,000/- awarded under this claim includes loss of profit, productivity and expenses on machinery and equipment. He submits that grave misconduct had been committed while considering and awarding this sum. He submits that once the contract terms and conditions are taken into account, then there is no question of any speculation or guess work. Since the amount of Rs.4,56,000/- does not make any distinction between the actual expenses incurred and losses suffered on account of

wrongful omission, then there is no question of severing or separating the heads of the claims and the sums thereunder. Consequently, the entire award must be set aside on this ground alone.

23. The next contention of Mr.Dhanuka is that insofar as claim nos.3 and 4 for compensation on account of overheads and profit as well as extra expenditure, assuming that a claim could be made under these heads, still, without considering the pleas on delays, extension and affixing responsibility thereof, the Arbitrator could not have granted any sums in favour of first respondent. Elaborating further, he contends that the quantum of work done includes overheads etc.. All items are included in the running bill. It is not in dispute that the payment of running bill has been made. Therefore, element of overhead and profit cannot be included once again and made subject matter of a claim before the learned Arbitrator. That apart, he contends that loss of profits on account of overheads during the contractual period cannot be claimed. He submits that as far as contractual period is concerned, the contractor is obliged to make available at site labour and materials. He

cannot claim any compensation for loss of profit during this period. In any event, the amount demanded in the running bill included the element of profit during the contractual period. That amount is already paid. For the extended period there is no question of including the very same components, namely, losses suffered on account of overheads and profit. He invites our attention to para 11.3 of the statement of claims in support of this contention and submits that at the most claim for overheads on account of delay could have been considered. However, for awarding any sum under this head, the Arbitrator must necessarily apportion the blame on the party namely appellant in this case and then proceed to award any sums.

24. Mr.Dhanuka submits that similar is the case as far as loss of profit is concerned. He submits that the total profits, as computed in the statement of claims, are for the period of 37 months. Out of these 37 months, 24 months were stipulated as completion period. There was no question of any profit loss during stipulated period. He invites our attention to clause-74 of the General Terms and Conditions. He submits that the formula set out therein is binding on

parties. Once clause 74 prohibits consideration of the sums under this head, then the contractor cannot claim reimbursement or refund. The Arbitrator could not have overlooked this prohibitory condition. Escalation over escalation is not permissible. After noticing that credit has been given on account of escalation as per the agreed formula, then there is no occasion to award claim no.4 according to Mr.Dhanuka. He, therefore, contends that the award is vitiated by errors apparent even as far as this aspect is concerned and is, thus, liable to be set aside.

25. Lastly, Mr.Dhanuka contends that claim no.5 of interest is awarded by the Arbitrator in its entirety. He submits that the Arbitrator has considered all three periods namely past, pendente lite and future. He submits that the interest has been awarded by the Arbitrator on the basis that clause-85 of the General Conditions of contract does not prohibit the Arbitrator from awarding interest. The Arbitrator has proceeded on the basis that the present case is a fit matter for award of interest under all three counts. The rate of interest also has been determined @ 13% and 18%

p.a.. Mr.Dhanuka submits that considering the fact that the claim numbers 2 to 4 are for compensation and damages, interest cannot be awarded on the same. The very nature of the claim suggests that the amounts are crystalised by the award. If such is the case, then interest for the pre-reference and reference period cannot be awarded on claim numbers 2 to 4. He submits that one more error committed by the Arbitrator is that he has allowed interest at different rates. He submits that pre-reference interest must be Bank rate. Further, mandate of Section 29 of the Arbitration Act, 1940 is ignored inasmuch as interest on interest cannot be awarded. The Arbitrator has failed to notice that interest @ 18% p.a. is not the prevailing rate of interest, and therefore, assuming without admitting that the claim for interest could have been considered and granted, the learned Arbitrator ought to have determined the rate of interest on the basis of prevailing bank rate in the market. The award is, therefore, liable to be set aside.

26. Mr.Dhanuka makes serious grievance insofar as cost of arbitration awarded and rejection of counter claims made by the appellant. Mr.Dhanuka

contends that no reasons have been assigned for rejecting the counter claims. He submits that the counter claims have not been considered at all by the learned Arbitrator.

27. Mr.Dhanuka, therefore, submits that the award which is vitiated in the aforesaid manner and incapable of being saved by segregating or separating parts thereof, must be set aside in it's entirety and the appeal be allowed accordingly.

28. In support of his contentions Mr.Dhanuka relied upon the following decisions :-

1. (1994)4-SCC-665 (Union of India Vs. Jain Associates.)

2. 2000(3)-BCR-347 (MSEB Vs. Sterlite Industries)

3. AIR-2001-SC-1523 (Ramchandra Reddy & Co. Vs. State of Andhra Pradesh & others).

4. (1997)4-Mh.L.J.-70 (BMC Vs. Thermal Engg.)

5. (2002)2-BCR-10 (Sumi Tomo Heavy Industries Ltd. Vs. ONGC)

6. AIR-1974-SC-1265 (Union of India Vs. Raman Iron Foundry)

7. 1996(2)-Mh.L.J.-971 (MSEB Vs. Bharat Conductors)

8. 1999(1)-BCR-269 (BMC Vs. Kulkarni &

Co.)

9. Unreported judgement of Smt.K.K.Baam J. Dated 10th June 1998 in case of BMC Vs. Thakkar & Associates.

10. Unreported judgement of Division Bench of Mr.M.B.Shah, C.J. and P.S.Patankar in case of M/s.Chavan Construction Vs. The MCGM.

11. Unreported judgement of Smt.K.K.Baam J. in case of MCGM Vs. M/s.Mohinder Singh & Company & ors.

12. 1999(1)-BCR-356 (Hotel Corporation of India Vs. M/s.Motwani (P) Ltd.

29. On the other hand Mr.Vashi - learned counsel for respondent no.1 - original claimant submits that the arguments of Mr.Dhanuka have travelled much beyond the grounds raised in the Arbitration Petition. He submits that the appellant cannot be permitted to urge contentions which are not based upon grounds raised in the Arbitration Petition. In any event, he submits that the contentions which are not raised before the learned Single Judge, cannot now be permitted to be raised in Appeal. He submits that this is a Letters Patent Appeal. An LPA is not as of right. He submits that almost all contentions raised before us, have not been raised in the arbitration petition, and no grounds based thereupon have been set out therein. Mr.Vashi submits that in this case the controversy whether

Clause-96 of the contract is independent of Clause-97 or not, need not be considered. Factually, the claims raised before the Municipal Commissioner and the Arbitrator are not distinct and separate. He invites our attention to the correspondence as well as the note in the files maintained by the appellant and contends that suggestion to resort to Arbitration (Clause-97) came from the appellants and it is not open to them now to urge that the claims raised by respondent no.1 could not have been entertained. He submits that the factual position being clarified in the note dated 12th December 1991 it is enough to reject the contentions of the appellant on this aspect. He submits that once fresh invocation of Arbitration is a suggestion coming from the appellant, then first respondent had to make another request and such request was incorporated in a letter dated 4th January 1992. In any event, Mr.Vashi submits that the nature of the claim remains the same and all that has changed, is the quantum and nothing else. He invites our attention to the finding of the learned Single Judge on this aspect as well as on the issue that the plea of Arbitrator’s jurisdiction has not been raised by the appellant in the petition. In this view of the matter,

according to Mr.Vashi, there is no substance in these contentions of Mr.Dhanuka and the appeals should be dismissed.

30. Alternatively, Mr.Vashi submits that the grounds in the Arbitration Petition do not demonstrate that the appellant came forward with a case of legal misconduct. In this behalf he invites our attention to grounds (a), (b) and (f) of the Arbitration Petition. He submits that points which are not raised before the learned Single Judge and also before the learned Arbitrator, cannot be permitted to be now raised in appeal. Yet, with a view to satisfy the judicial conscience, the first respondent is willing to demonstrate that the award is not vitiated as urged by the appellant.

31. In this behalf Mr.Vashi contends that a perusal of claim nos.3 and 4 would demonstrate that the sums as claimed by the first respondent, have not been awarded. On the other hand, substantial portion of the same is refused and rejected. There is, therefore, no error apparent on the face of the award. Assuming that there is any such error, no pleading and no submission in that behalf is raised before the learned Single

Judge and it is, therefore, not permissible now to urge that the award should be set aside.

32. In any event, Mr.Vashi submits that the Arbitrator has not granted anything beyond the contract. He submits that the claims which are not prohibited can always be made and considered. If the same are proved to the satisfaction of the Arbitrator, he has powers to grant the same. Precisely, this is what is done in the instant case. Therefore, the award does not shock judicial conscience of this Court. The Arbitrator has taken care to give credit and make appropriate deductions while awarding sums in favour of first respondent.

33. Mr.Vashi invites our attention to clauses 14 and 94 and contends that there is no prohibition therein in granting the sums as claimed. There is nothing which prohibits granting anything beyond actual expenses. He submits that Fixed Material Rate (FMR) is always there but in the event of contain contingencies appropriate claims can be made. Clauses 14 and 94 operate in separate area and field. Assuming without admitting that clause 94 operates, there is no prohibition in considering and awarding the

claims. There is no abandonment of the contract. He invites our attention to the letter dated 14th February 1988 (Exhibit C-17) and contends that the Arbitrator has considered all claims, though made under distinct sub heads, together. Evidence has been led and claimants (first respondent) have proved that they are entitled to all amounts. Further the Arbitrator has, yet, made deductions and not granted the claims completely.

34. Mr.Vashi has then taken us through the materials placed before the Arbitrator with regard to claim no.1 (Item No.4). He submits that the water connection was to be provided by the appellant. However, the said facility has been taken away and withdrawn because of the undertaking of the first respondent. However, the undertaking is not unconditional. When MCGB does not provide water and first respondent arranges for the same through other sources, then it is entitled to make a claim in that behalf. Such claim has not been granted in full. He submits that in the light of the undertaking, appropriate deductions have been made and what is sought to be reimbursed is the actual expenditure. Even other claims for refund have

not been granted completely but partially. Some have been allowed marginally. In these circumstances, when the Arbitrator has acted within his limits and powers and interpreted the contract terms, then it is not open for this Court to exercise its jurisdiction under section 30 of the Arbitration Act and set aside the award in question.

35. Mr.Vashi lastly urges that even the claim for interest has been rightly considered and granted. He submits that there is no substance in the contention that interest on interest is granted. On the other hand, it is clear from the record that prior to its amendment Interest Act did not apply to the proceedings before an Arbitrator. After the amendment to the said Act, it is open for the Arbitrator to consider the claim for interest at all stages. However, this power is subject to Section 29 of the Arbitration Act, 1940. Mr.Vashi submits that in the present case notice under the Interest Act is given by first respondent on 27th October 1989. The Arbitrator has acted within his powers and therefore, the claim for interest has been awarded correctly. That apart, Mr.Vashi submits that there is absolutely no pleading with regard

to claim no.5 (interest). There is no ground in the petition complaining that interest is awarded on interest. In these circumstances, it is not open for the appellant to urge that the award insofar as interest is concerned, should be set aside.

36. In support of the aforesaid submissions Mr.Vashi places reliance upon following decisions:-

1. (2001)2-SCC-721 (Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and others Vs. N.C. Budharaj (Deceased) by LRs and others.

2. (2005)6-SCC-462 (Bhagawant Oxygen Ltd. Vs. Hindustan Copper Ltd. WITH Hindustan Copper Ltd. Vs. Bhagawant Oxygen Ltd.)

3. AIR-1999-SC-1614 (ONGC Vs. M/s. M.C.Clelland Engineers S.A.)

4. AIR-1967-SC-1233 (Madan Lal (dead) by his LRs Vs. Sunder Lal and another).

5. AIR01984-SC-29 (M/s.H.M. Kamaluddin Ansari & Co. Vs. Union of India and others WITH Shankar Vijay Saw Mills Vs. Union of India and others).

37. In view of the rival contentions the question that falls for our consideration is whether the learned Judge was in error in refusing to exercise his jurisdiction under

section 30 of the Arbitration Act, 1940 and set aside the award in question.

38. Before this question can be answered, it is necessary to advert to the undisputed and admitted facts. It is not in dispute that first respondent was awarded the contract for all sections. It is further not in dispute that initially the valuation of the contract was Rs.1,37,49,417/-. Subsequently, the bill of items was increased and there was a revision effected in the rates as well. Therefore, Standing Committee approval was sought and upon grant of the same, the valuation stood revised at Rs.2,24,67,307/-. It is also not in dispute that the period of completion was extended. The further admitted position is that extension was granted up to 30th September 1990. The original date of completion was 12th December 1989.

39. Both sides agree that the terms and conditions on which the contract work was to be executed are these :-

"MUNICIPAL CORPORATION OF GREATER BOMBAY

GENERAL CONDITIONS OF CONTRACT FOR CIVIL WORKS

NOVEMBER 1980"

40. Since reliance is placed upon clauses 96 and 97 of the terms and conditions, they are reproduced hereinbelow :-

> "96. ANY DISPUTE OR DIFFERENCE TO BE REFERRED TO COMMISSIONER :-
>
> If any doubt, dispute or difference arises or happens between the Engineer or any other officer on the one hand and the Contractor on the other hand, touching or concerning the said works or any of them or relating to the quantities, qualities description or manner of work done and executed by the Contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations, or deviations made into or from the said works or any part of the, or touching or concerning the meaning or intension of this contract or of any part thereof or of any plans, drawings, instructions or directions referred to therein or which may be furnished, or given during the progress of the works, or touching or concerning any certificate, order, or reward which have been made or in any way whatsoever relating to the interests of the Municipal Corporation or of the Contractor in the premises, every such doubt, dispute and difference shall from time to time be referred to the Commissioner who shall give his decision within a period of 90 days and if the contractor is not satisfied with the decision of the Commissioner or the Commissioner fails to give the decision within the period of 90 days, such dispute may be referred to arbitration as per condition no.97.
>
> 97. ARBITRATION :-
>
> All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the

works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract or the construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration.

Arbitration shall be effected -

(i) by an Arbitrator agreed upon by the parties or failing agreement upon such an Arbitrator,

(ii) by an Arbitrator appointed by the President for the time being of the Institute of Engineers (India) or by the President of the Bombay Centre of the Institute of Engineers (India), or failing such appointment,

(iii) by an Arbitrator appointed by the Chief Engineer, Buildings and Communication Department, Government of Maharashtra, or failing such appointment,

(iv) by an Arbitrator appointed in accordance with the provisions of the Indian Arbitration Act which law governs the contract.

The Arbitrator so appointed shall be a person presently unconnected with the organisation for which and by which the work is executed.

Submission to arbitration shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, which law governs the contract.

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole Arbitrator shall be appointed as aforesaid.

The work under the Contract shall, if reasonably be possible, continue during the Arbitration proceeding and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time for making and publishing the award.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of Arbitrator shall be within the limits of Greater Bombay.

The fees, if any of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof be paid and may fix or settle the amount of cost to be so paid."

41. Before rival contentions are considered, it would be appropriate to refer to Section 30 of the Arbitration Act, 1940. It reads thus :-

> "30. GROUNDS FOR SETTING ASIDE AWARD :-
>
> An award shall not be set aside except on one or more of the following grounds, namely :-
>
> (a) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
>
> (c) that an award has been improperly procured or is otherwise invalid."

In the present case, the grounds for setting aside the award in question are traceable to Section 30(a) reproduced above. It is well settled that an arbitrator is a judge appointed by the parties and as such the award passed by him is not to be lightly interfered with. The court while exercising power under section 30, cannot reappreciate the evidence or examine correctness of the conclusions arrived at by the arbitrator. The jurisdiction is not appellate in nature and an award passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the

proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such award. It is further well settled that the role of the arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract, that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court. On this aspect it must be noticed that in decision reported in AIR-2003-SC-3660, the Supreme Court has held that the Arbitrator should take into consideration relevant provisions contained in the agreement as also the correspondence between the parties. The Arbitrator cannot act arbitrarily, irrationally and capriciously or independent of the contract. The Supreme Court has referred to its earlier judgements in the case of AIR-1992-SC-232 (Associated Engineering Co. Vs. Government of A.P.) and (1975)2-SCC-236 (K.P.Poulose Vs. State of Kerala). It also refers to a decision reported in (2001)5-SCC-629 (Sikkim Subba Associates Vs. State of Sikkim). These decisions enunciate the principle that the word "misconduct" cannot be exhaustively defined.

However, Courts of Law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the material on record or the governing position of law, to interfere. The principle equally well settled is that the arbitrator must act in accordance with the contract and if there is a specific bar in awarding a particular item or claim or the manner of considering the said claim or item is set out, then both aspects cannot be ignored and brushed aside by the arbitrator. Therefore, limited as the jurisdiction may be still this Court can in exercise of its powers under section 30 scrutinise the award for the purposes of satisfying itself whether the arbitrator has exceeded his jurisdiction or not.

42. Both sides relied upon several decisions to emphasise this aspect. We need not advert to

each one of them in details. Suffice it to state that we have considered the matter applying the tests laid down therein.

43. A bare perusal of clause-96 of the contract contemplates reference of the disputes or differences to the Commissioner. Such dispute or difference should be between the Engineer or any other officer on the one hand and the contractor on the other. It should touch or concern the said work or any of them or relating to the quantities, qualities, description or manner of work done and executed by the contractor or to the quantity or quality of the materials to be employed therein or in respect of any additions, deductions, alterations or deviations made into or from the said works etc.. The clause contemplates, therefore, reference of disputes or differences during the course of execution of contract, to the Municipal Commissioner, who is to give his decision thereon. If the contractor is not satisfied with the decision of the Commissioner or he fails to give decision within the period stipulated, then such dispute may be referred to Arbitration as per clause-97. Clause-97 dealing with arbitration is worded in widest terms. It includes reference of all

disputes and differences whatsoever and does not restrict to any party. In other words, all disputes or differences whether during or after completion of the contract or whether before or after determination, are capable of being referred to Arbitration.

44. The argument of Mr.Dhanuka that the claims have to be made firstly before the Commissioner and only such claims are capable of being referred to arbitration, is not well founded considering the aforesaid clauses. There is nothing by which one can conclude that the reference to arbitration is in any way dependent upon the out come of proceedings before Municipal Commissioner. On the other hand, what the Municipal Commissioner does is also not final and his decision can be referred to arbitration. Hence, it is not as if the contractor must first approach the Commissioner or that he can seek reference of only such disputes and differences to arbitration, which have earlier been subject matter of decision by Municipal Commissioner.

45. Nothing further be said as, in the present facts and circumstances, we are in agreement with the learned Judge that the claims made before the

Municipal Commissioner as early as in 1988 and subsequently in 1990, 1991 and 1992 are not distinct from those raised during arbitration. It may be that the quantum has undergone a change but nature of the claims remains more or less the same. Therefore, the first contention of Mr.Dhanuka is rejected.

46. Once this contention is rejected then, in our view, it is not necessary to refer to the decisions cited by Mr.Dhanuka as far as arbitrability of the claims. Mr.Dhanuka has based his submissions with regard to item no.4 of claim no.1, and claim numbers 2,3,4 and 5. However, it must be noted that the submissions proceed on the basis that the Arbitrator has gone beyond the terms of contract.

47. It appears that before the learned Single Judge the argument was that the claims were inconsistent with each other and could not have been awarded. Similarly, claims have been awarded in contravention or breach of the contractual stipulations. In our view, Mr.Vashi’s submission that the contentions raised before us are not at all raised in the arbitration petition or that they were not raised

before the Arbitrator is some what hyper technical. Having noted the contentions raised before the learned Single Judge which have been formulated by him at page 5 (running page no.132 of the paper book), we are of the considered view that it would be open for the appellant to urge that the order passed by the learned Single Judge is erroneous, as the contractual stipulations have not been considered at all. Therefore, it would be proper to analyse the contentions claim-wise.

48. As far as claim no.1 (item 4) is concerned, the complaint of Mr.Dhanuka is that said claim has been entertained and granted despite unconditional withdrawal by the claimants of a stipulation regarding water supply. He submits that there was no occasion to direct refund of the amount deducted. He submits that as against the total claim of Rs.7,62,742=11 Ps. which was inclusive of Rs.4,46,897=97, towards 3% of the value of the work, alleged to have been recovered by the appellant against various running bills, A sum of Rs.2,69,383=19 Ps. in respect of the amount alleged to have been incurred for bringing water from outside by tankers and a further sum of Rs.47,464=96 Ps. towards escalation, the

Arbitrator has awarded Rs.4,37,897/- towards alleged 3% deduction. This deduction, according to the Arbitrator, is towards supply of water.

49. Mr.Dhanuka submits that there has been no deduction of any amount for supply of water from the bills of the first respondent. The deduction of 3% was made for accounting purposes but there were no actual deductions from the bills. He invites our attention to the fact that there is a procedure followed by the MCGB whereunder water charges, supervision charges etc. are required to be added in the contract, and therefore, deducted for accounting purposes. He states that there are Standing Committee Resolutions in that behalf. The amount is initially added to each bill towards water charges and is deducted at the end of it. A separate provision is made for supply of water by the appellant. This position has not been noticed by the Arbitrator and he wrongly directs refund. There is an error apparent on the face of record, according to Mr.Dhanuka. Mr.Vashi, on the other hand, states that the Arbitrator has rejected the claim made with respect to procurement of water by tankers from outside. He invites our attention to the discussion in the award in this aspect.

50. Item no.4 is wrongful and illegal deduction for cost of water not supplied. The case of first respondent is that if agreement provides for recovery of 3% of the value of the work towards water charges, then the appellant was bound to supply water through an unmetered connection. The Arbitrator has noted undisputed fact that the appellant did not supply water either through meter connection or otherwise. The admitted position before the Arbitrator was that water required was brought by tankers by first respondent. During execution, measurements were recorded and payments released towards reimbursement of the costs of water brought by tankers at site. The first respondent prayed that 3% deduction made from their bills deserves to be set aside and amounts be refunded which were so deducted. Escalation is also claimed by the claimant formally. The case of the appellant was that they were only to give half inch water connection for drinking purposes. They also relied upon letter dated 19th December 1985 addressed by first respondent withdrawing condition regarding payment for water brought by tankers. Although case of the first respondent is that the condition was withdrawn on an

assurance that water for construction will be supplied, the Arbitrator has not granted the claim as far as costs of water brought by tanker from outside by the first respondent. He grants benefits of letter dated 19th December 1985 to the appellant. He, therefore, rejects first respondent's claim as far as this aspect is concerned. However, relying upon admitted position that water was not supplied by the appellant during execution of the work either by tanker or otherwise, the Arbitrator holds that the deduction of 3% towards costs of water is unjustifiable and therefore, amounts in that behalf must be refunded.

51. In our view, once the appellant has not been able to demonstrate that such claim could not have been entertained at all then calling upon us to scrutinise the reasons and conclusions of the Arbitrator with regard to this claim, is nothing but praying for our intervention as an Appellate Court. It is well settled that this Court while entertaining a petition to challenge the award, does not act as a Court of Appeal and cannot appreciate or reappraise the materials placed before learned Arbitrator. Considering the totality of the matter, in our view, as far as

this item is concerned, the Arbitrator has not committed any error apparent on the face of record and therefore, the second contention of Mr.Dhanuka is liable to be rejected. Once we are of the view that the Arbitrator has relied upon admitted facts placed before him, then the ultimate conclusion reached as far as this item is concerned, cannot be faulted.

52. The next contention of Mr.Dhanuka pertains to claim no.2. That claim is for compensation for loss suffered on account of wrongful omission of an item of work. The claim arose on account of construction of Central Divider. The cost incurred was Rs.12,26,610/-. The agreement incorporated provisions empowering the Engineer to make changes. However, first respondent's case is that after arrangements were made for executing the work, by fabricating form and shuttering and after deployment of machinery and equipments for executing the work in this manner, this item was excluded by the appellant from the scope of work. It is their case that not only was this item excluded but the appellant got it executed through other agency. The defence of the appellant was that there is no such fabrication or special shuttering required for

central divider and they denied that any machinery or equipment was deployed.

53. The Arbitrator seems to have been impressed by the fact not only was the design modified but the work was executed by some other agency at substantially lower cost. The Arbitrator noted that first respondent’s tender was 35.35% above the estimated cost and substantial reduction in scope of work is bound to result in loss of overheads and profit, reduced productivity from machinery and equipment besides direct expenses incurred. The total claim was Rs.5,96,746=88 Ps.. Mr.Dhanuka submits that under clause-14 of the General Conditions of Contract (GCC), the contract at the most can make a claim for the expenses incurred on the primary activity but he cannot claim compensation under the head Claimed before the Arbitrator. He submits that clause-14 has been brushed aside by the Arbitrator while awarding the sums under this heading. That apart, he submits that there is no evidence to support the conclusion. The claim for loss of productivity, overheads and profits are over-lapping and contrary to clause-14 of the GCC..

54. Mr.Vashi, however, submits that the power conferred vide the aforesaid clause on the Engineer has been interpreted by the Arbitrator to mean that the agreement provides for reasonable compensation in such an eventuality. He submits that the Arbitrator has interpreted the terms of contract and the interpretation of the Arbitrator as far as terms are concerned, is binding upon the parties. When the Arbitrator interprets a term or stipulation in the contract, he does not act outside his jurisdiction or authority. Therefore, no fault can be found with the conclusion of the Arbitrator.

55. Clause-14 of the GCC provides that the Engineer has power to issue further drawings or instructions. The clause outlines his power and authority and states that whenever any instructions and directions, as may appear to the Engineer necessary for execution of the work or for guidance of the contractor, are issued, the contractor is bound to obey them. However, the clause itself contemplates that the true intent and meaning of such directions and instructions is to enable good and efficient execution of the work according to the terms and specifications. The Engineer is further empowered to order that

any of the works contemplated by the terms and conditions to be omitted, with or without substitution of any other works in lieu thereof and may further order, if needful, that works contemplated be substituted and difference of expenses occasioned by any such exercise is to be in accordance with condition no.73. The clause contemplates that no radical changes can be made. Something which changes the original nature of the contract radically, cannot be directed to be done by the Engineer and in the event of any deviation being ordered, which in the opinion of the contractor changes the original nature of the contract, he shall carry it out and disagreement as to the nature of the work and the rate to be paid therefor shall be resolved in accordance with condition no.97. In other words, if the instructions and directions as well as orders omitting and/or substituting the nature of work radically change the nature of the original contract and if the contractor carries out the same, he can make a claim before the Arbitrator. The Engineer’s decision has been given finality only with regard to extension or reduction of time for completion of work as ordered and directed by him.

56. What the Arbitrator has noted in this case is that the appellants have modified the design. They have got the work done at substantially lower rates than the first respondent from some other agency. The award is silent about the original nature of the contract being radically changed or not. On the other hand, the Arbitrator proceeds on the basis that the Engineer has made changes in drawings. The Arbitrator proceeds on the basis that the Engineer was empowered to do so in terms of the aforesaid clause. However, the Arbitrator awards claim of the first respondent on the basis that they made arrangements for executing the work and after such arrangements were made, the item was excluded from the scope of work assigned to them. This fact has been denied. The Arbitrator does not refer to any material which has been placed for his consideration by first respondent to support their contentions that they were agreeable to execute the work as per the changed design or pattern and that the design or pattern was altered and the item deleted from the scope of the work after all arrangements were made by them. The Arbitrator proceeds on the basis that the costs quoted by the first respondent were as it is 35% above of the estimated cost and on that

basis he draws a presumption that substantial reduction in the scope of work is bound to result in loss of overheads and profit, reduced productivity by keeping the equipments idle besides direct expenses incurred. The Arbitrator observes that evidence in support of this claim in part has been placed before him and first respondent showed their willingness to complete the work as per the changed design.

57. However, when this aspect has to be considered, stipulation in clause-73 cannot be lost sight of. Clause-73 is in two parts. Firstly, it deals with rates for excess and secondly, bills for rates for extra. As far as the claim of respondent no.1 under the present head, it would fall in clause 73(B)(i). However, clause 73(b)(i) specifically deals with contingencies where rates have been quoted by the contractor upto 25% over the quantity and rates and beyond 25% of the quantity shown in the same. When the quantity increases beyond 25% which admittedly in this case is 35.35%, then the mandate of clause 73(a)(i) and (ii) has to be followed. The MCGB’s fair market schedule cannot be disregarded while computing the amount and awarding the claim. Similarly, if the rate for

any additional, altered or substituted item of work cannot be determined in the manner specified in section 73(1)(b) and (ii) or the rate so determined is found to be unreasonable, then also the contractor will be paid off such fair and reasonable rates as worked out by the Engineer and only the percentage to cover profits and overheads as stipulated in the same (clause-73), can be taken into consideration and awarded.

58. Once the Arbitrator has concluded that the work was not carried out by the first respondent but some other agency and the claim has not been scrutinised on the touchstone of clause-73 as referred to above, then, in our view, the award as far as this item is concerned, is plainly erroneous. It is vitiated by error apparent on the face of it. The claim made has not been scrutinised and considered by the Arbitrator in accordance with the aforesaid clause but by disregarding it. Mere arrangement made by first respondent to carry out the work as per the changed design, would not be enough to award any sum under this head. The conjecture on the part of the Arbitrator is that once the rates are quoted at 35.35% above the estimated cost then there is bound to be loss of overheads and

profits, reduced productivity besides direct expenses incurred. All that the Arbitrator could have awarded is only a sum of Rs.1,54,000/- towards cost of part of work which is carried out. The Arbitrator could not have awarded any amount for loss of productivity, overhead and profit in breach of the mandate of Clauses 14 and 73. The award insofar as it directs the appellant to pay to the first respondent a sum of Rs.4,56,000/- under claim no.2, is, therefore, liable to be interfered with and substituted by only awarding payment of actual costs i.e. Rs.1,54,000/-. We find from a perusal of the record that when the matter was before the Municipal Commissioner the first respondent claimed a lesser amount.

59. As far as claim nos.3 and 4, they are dealing with compensation for loss on account of overheads, profits and refund of rates. Here again, the Arbitrator concluded that extension of time was granted without levy of supervision charges and recovery of penalty for reasons beyond the control of first respondent. The Arbitrator holds that the first respondent has proved that they made a provision in the tender towards overheads and profit at a rate at which

they generally operate and that they have actually suffered losses on account of overheads and profit. They have produced rate analysis, according to the Arbitrator, of major items and produced extracts of audited statements of accounts duly certified by their Chartered Accountant. From all this material, according to the Arbitrator, first respondent has established 25% loss on account of overheads and profit.

60. The grievance of Mr.Dhanuka is that first respondent claimed overheads and profit @ 25% of the contractual amount. The deduction is of a sum of Rs.3,16,246/- from the total amount of gross claim. Mr.Dhanuka took us through the statement of claim and several items and sub heads under this claim enlisted therein with a view to buttress his submission that although the learned Arbitrator states that no loss of profit is awarded for the extended period, this claim is also granted if one looks at the items and sub items of this head. Mr.Dhanuka took us through all the figures. Mr.Dhanuka also took us through the main heading and the sub heading while strenuously contending that the Arbitrator has allowed substantial part of the loss of profit during the extended period. Mr.Dhanuka’s

complaint is that there could not have been any claim for loss of profit during the original stipulated period as the percentage of element of profit is included in the price bid submitted by the first respondent. Mr.Dhanuka submits that first respondent had already earned profit and therefore, there is no question of awarding loss of profit during the stipulated time limit. He submits that the work assigned to the first respondent was completed and the contract was not terminated. Mr.Dhanuka submits that no evidence was led to prove the breaches alleged to have been committed by the appellant or to prove the actual losses/damages alleged to have been suffered by first respondent. It appears that the Arbitrator has proceeded on the basis that this claim is logical. However, the Arbitrator has denied the claim of loss of profit during the extended period. He, therefore, awards a sum of Rs.21,20,000/- as far as claim no.3.

61. We cannot uphold the basis on which the Arbitrator has proceeded. If first respondent has proved that in tender rates they included overheads and profit at a rate at which they generally operate, then compensating them for losses incurred during the contractual/

stipulated period cannot be said to be logical at all. First respondent led some evidence to support their claim for loss during extended period. The Arbitrator was aware of the fact that there cannot be duplication in reliefs and no extra compensation then just can be awarded. He has not awarded the losses on account of delay.

62. Mr.Vashi supports the award by contending that the entire claim is not granted. In any event, he contends that there is no error apparent as far as this aspect is concerned and that is not even the case pleaded by the appellant.

63. However, for reasons already recorded above, we cannot uphold the award when the Arbitrator proceeds not only erroneously but inconsistently. The award on the face of it contains an error as noticed by us above. It is not as if any elaborate or deeper scrutiny and probe had to be undertaken to notice the same.

64. The Arbitrator ought to have noticed the clauses in the contract and considered the claims in the light of the same.

65. Assuming, as Mr.Vashi does, that clause-94 of the GCC has no application and claim nos.3 and 4 could have been considered and awarded, yet, the Arbitrator was bound to consider them in the light of the pleadings and materials.

66. When the claimant has based the claim on delay in carrying out the work on account of which it suffered losses, then the Arbitrator could not have travelled beyond the same. In our view, on a plain reading of the statement of claims and more particularly para 11.3, the Arbitrator could not have awarded a sum of Rs.21,20,000/-. The Arbitrator should have noticed that the first respondent claimed Rs.11,30,347/- on account of losses suffered during the stipulated time limit. The claimant produced materials in support of this figure/sum. However, the Arbitrator failed to note that in the particulars furnished by the claimants in support of this claim, in paragraph 11.3 at sr.nos.2 and 5, they claimed the following sums:-

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11.3 CLAIM NO.3 :- COMPENSATION FOR LOSS SUFFERED ON ACCOUNT OF OVERHEADS AND PROFIT :-

> The Claimant states that in view of the facts and circumstances stated in paragraphs 7 to 10 above including their sub-paragraphs the work was delayed and the Claimant could not complete the work within the stipulated time and in result the Claimant suffered a loss of Rs.12,13,758.48 on account of overheads and profit as detailed below :-
>
> | | | |
> |---|---|---|
> | 1. | ... ... | |
> | 2. | Overheads and profit included in the above sum at 25% | 32,09,368-34 |
> | 3. | ... ... | |
> | 4. | ... ... | |
> | 5. | Towards overheads and Profit received at 25% of (4) above | 21,82,200-71 |

On the own showing of the claimant the contract sum included overheads and profit @ 25%. They valued the work and computed 25% towards overheads and profit received on the said value as well. They restricted their alleged claim of loss during the stipulated time limit to Rs.11,30,347/-. When the Arbitrator awards actual out of pocket expenses incurred extra to the full extent and accepted profit loss within the stipulated period, it is not clear as to whether he had in mind the figure of Rs.11,30,347/- or also the sum claimed towards losses suffered during the extended time limit. There is no working of the actual out of pocket

expenses. In fact, the claim does not at all appear to be for the contractual period. However, we are of the opinion that when the claimants restrained their claim of losses to Rs.11,30,347/- and produced materials to support them then interest of Justice would be subserved if we reduce the amount awarded under this claim to this figure. Claim no.3 is awarded accordingly.

67. As far as claim no.4 is concerned, the first respondent claimed compensation for losses suffered on account of revision of rates. It was their case that they were not bound to execute the work after the stipulated time limit at the original tender rates. It was their case that the rates for labour, material etc. rose sharply after the tender was submitted thereby forcing them to incur extra expenditure over and above the original contemplated. They claim a sum of Rs.8,58,514=14 Ps. under this head. The appellant denied this claim and disputed the correctness of this figure as well. It was their case that the first respondent is not entitled to the amounts as claimed.

68. Mr.Dhanuka’s submission is that the

appellant awarded price escalation to the extent of 29% only. After giving credit for Fixed Issue Rates for cement and steel and escalation, the first respondent claimed escalation on escalation at 50% of the value of work i.e. Rs.17,13,023/-.

69. In this behalf the Arbitrator has noted the allegations pertaining to acts of omission and commission on the part of appellant. He has also noted the denials of appellant. The Arbitrator has held that the contractor could work for 727 days and 391 days no work was carried out and first respondent is not responsible for the same. The Arbitrator has proceeded on the basis that this aspect is not disputed by the appellant as well.

70. If the Arbitrator felt that the claim on account of reimbursement of variation of price of labour and materials could have been considered and granted, then it is quite clear that the mandate of clause 74 of the GCC had to be followed. The appellants have already paid the escalation of the entire work during the extended period on the basis of formula described under clause-74.

71. Thereafter, there was no warrant for granting further amounts. The claim as made is for net extra expenditure. That took into account the escalation at 29% granted by the appellants. However, the Arbitrator has given credit on account of material supplied by the appellants to the first respondent and escalation due and payable under the agreed formula. In award, as far as claim no.3 is concerned, we have interfered with the quantum awarded on the basis that the mandate of the contract conditions has been ignored by the learned Arbitrator. We have interfered with the said claim as there is much substance in the grievance of the appellants that as far as loss of profit during the stipulated period is concerned, no claim could have been raised. The Arbitrator has, while taking cognizance of claim no.4 which was for loss suffered on account of extra expenditure incurred on labour, materials etc., has considered the grievances of respondent no.1 while awarding the claim no.3. The value of the work done during the extended period is Rs.17,13,028-28 Ps.. It has not been disputed that the appellants awarded price escalation to the extent of 29%. In the earlier claim (claim no.3), loss suffered during the stipulated time limit has already been

considered and awarded. There was, therefore, no warrant to once again award self-same claims under a different heading. In other words, merely because the wording of the claim is "for loss suffered on account of extra expenditure incurred on labour, materials etc.", that component is part and parcel of claim no.3 and could not have been separately considered and awarded. That apart, the mandate of clause 17(4) could not have been brushed aside. Therefore, the sum awarded under this heading namely Rs.5,59,559-90 Ps. should not have been awarded. The learned Arbitrator has erred in awarding this sum. Even otherwise, there is nothing to indicate that the sum arrived at is as per the formula prescribed under clause 74 referred to above.

72. As far as claim no.5 i.e.interest is concerned, the grievance of Mr.Dhanuka is that interest has been awarded for pre-reference and pendente lite period on claim nos.2 to 4. He submits that these claims are for compensation/ damages and they are crystalised on the date of award. Therefore, no interest for these periods could be awarded on claim nos.2 to 4. The grievance is that the Arbitrator has allowed

future interest on the entire amount which is inclusive of interest for the aforesaid periods and this is totally illegal and impermissible.

73. Mr.Vashi submits that the Arbitrator has power to grant interest at all stages subject, however, to the provisions of Section 29. He invites our attention to the Constitution Bench decision of Hon'ble Supreme Court reported in 2001(2)-SCC-721 (Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and others Vs. N.C.Budharaj (Deceased) by LRs and others).

74. For appreciating these contentions a reference to this decision is necessary.

75. Before the Constitution Bench the issue was whether the Arbitrator has got jurisdiction to award interest for pre-reference period which arose prior to the commencement of Interest Act, 1978 as amended in 1981. A Bench of three learned Judges of Supreme Court who earlier heard the appeals referred the matter to the larger bench for a authoritative pronouncement on the question framed for consideration in paragraph 2, by the Constitution Bench. The majority answered the question as posed in paragraphs 24, 25 thus:-

24. It is not in dispute that an arbitrator appointed in a pending suit or with the intervention of the court, will have all the powers of the court, in deciding the dispute and the dispute is only in respect of an arbitrator to whom the reference has been made by the parties, under the agreement without the intervention of the court. **It would then mean that the parties have to be driven to vexatious litigation before courts by passing an agreement of arbitration, to be ultimately told to abide by it and have the matter formally referred by staying such proceedings before civil court to secure to the arbitrator power to award interest also.** In G.C. Roy case while emphasising the importance and need for availing arbitration process, it has been observed as follows :(SCC pp.511-12 para4). ... ...

25. ... ... As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld. The submission that the arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that if the arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to

> the appointment of an arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same."

76. What we find in the present case is that clause-85 of the GCC prohibits interest for delayed payment due to disputes etc.. The claim on this count cannot be entertained by the Commissioner, as is set out in the said clause. It is nobody's case that it prohibits interest. In the light of the Constitution Bench decision, the contention of Mr.Dhanuka that the claim is crystalised on the date of award and therefore, no interest could be awarded for the periods i.e. pre-reference and pendente lite cannot be accepted.

77. However, there is much substance in the contention of Mr.Dhanuka that rate of interest for all periods, as granted by the Arbitrator (18%) is not sustainable. We need not disturb the rate of interest for past. However, the interest at 18% pendente lite and future interest also at 18% from 7th August 1992 can only be in

accordance with the Interest Act. The Interest Act, 1978, as amended, vide section 3, empowers a Court which includes Arbitrator to award damages at a rate not exceeding the current rate of interest. The said provision reads thus :-

> 3. POWER OF COURT TO ALLOW INTEREST :-
>
> (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-
>
> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
>
> (b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings;
>
> Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.
>
> (2) Where, in any such proceedings as are mentioned in sub section (1),-

(a) judgement, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that sub section shall be exercised so as to include in that sum interest on those damages or on such part of them as the Court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the Court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,-

(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect -

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881) or;

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the Court to award interest upon interest."

It is, therefore, necessary to modify the rate of interest for the periods aforesaid namely pendente lite and future to 12% and 8% p.a..

78. The decision cited by Shri Vashi on this aspect reported in (2005)6-SCC-462 (Bhagwant Oxygen Ltd. Vs. Hindustan Cooper Ltd.) has been noted by us. However, before the Supreme Court the uniform rate awarded for all periods was upheld because it was demonstrated that same was the rate prevalent when a loan was obtained. In the present case, the learned arbitrator has for the past awarded 18% p.a. whereas upon noticing the provisions of Interest Act and letter dated 27th October 1989, he has directed payment of interest @ 13% p.a. on the award sum under claim nos.1 to 4. This was bearing in mind the Interest Act. However, he has distributed the period and once again erroneously granted 18% p.a. on the sum awarded as above w.e.f. 1st December 1992 on which date he held a preliminary meeting till the date of signing of the award i.e. 6th August 1992. Thereafter, he awarded interest @ 18% p.a. on the award sums up to the date of payment by respondents or date of decree by competent Court. It is this aspect which is

termed as erroneous as well as bad in law by Shri Dhanuka. If 13% p.a. was the interest rate awarded from the date of notice under Interest Act i.e. 27th October 1989, then why the said rate was restricted in its operation till 31st January 1992, is not clear to us at all. Therefore, while not disturbing the rate of interest awarded for the past, we have interfered with the rate of interest awarded pendente lite and future as above.

79. In the light of the aforesaid, it is not necessary to consider the pleas of Mr.Dhanuka with regard to cost of Arbitration.

80. Thus, the learned Single Judge failed to exercise his jurisdiction under section 30 of the Act even though the Arbitrator had committed a serious error apparent on the face of the record. He had ignored and also failed to abide by the terms and conditions of the contract referred to above. There are sufficient grounds for interfering with the award to the extent indicated above. Shri Vashi was unable to satisfy us that the arbitrator had in fact acted in accordance with the contract and has not travelled beyond the same as far as the above

claims are concerned.

81. As far as counter claim is concerned, the grievance is that it has been rejected without assigning any reasons.

82. A perusal of the arbitration petition which was filed, however, demonstrates that all that the appellants contended was that the Arbitrator was biased. However, this ground seems to have been given up and no submissions have been canvassed before the learned Single Judge. We are, therefore, of the view that permitting Mr.Dhanuka to now challenge the award insofar as rejection of counter claim is concerned, would mean permitting the appellant to raise a contention which was expressly not pressed.

83. Even otherwise, on perusal of the award, we find that the first respondent was not liable for delays as also alleged breaches. The award cannot be faulted on this ground. The counter claim insofar as other aspects is not even substantiated.

84. In the result, the appeals succeed partially. As far as conclusion is concerned,

the contentions are that the award be set aside completely and not partially. Moreso, when it is not possible to segregate and separate the good and bad part of it. Mr.Vashi has not addressed us on this aspect. However, since the learned Arbitrator has awarded the sums claim-wise and we find that the award insofar as it directs payment of amounts wrongfully recovered and interest is not liable to be interfered with. That is the good part of it. It is also set aside by us as far as claim no.4 is concerned. We have interfered with the same insofar as claim no.2 partially and claim no.3 fully. Therefore, amounts awarded under these claims can very well be deducted and/or adjusted from the total sum awarded and the award can be saved and acted upon. Moreso, when no arguments have been advanced as far as amounts wrongfully withheld and/or recovered by the appellant. Hence, while partially allowing the appeals, it is permissible for us to modify the award which we do as under:-

CLAIM NO.	DECISION IN APPEAL
CLAIM NO.1 :-	
Item No.1) Plus) Item No.2)	Upheld and quantum kept Intact

Item No.3)	
Item No.4)	
Item No.5)	
CLAIM NO.2	Upheld and quantum reduced to Rs.1,54,000=00
CLAIM NO.3	Rs.11,30,347=00
CLAIM NO.4	Set aside.
CLAIM NO.5 :-	
Interest Past Pendente Lite Future	Rs.13,84,377=00 @ 12% p.a. @ 8% p.a.
CLAIM NO.6	Rs.1,00,000=00

The office to draw up the Decree in the light of above figures. This exercise is expedited. The amounts thereafter can be recovered and/or adjusted from the Bank Guarantee. Needless to state that the 1st respondent will have to deposit additional amounts to make good the short fall or deficit after the Decree is drawn up.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)